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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. [redacted] 87

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

	Page
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	12

TABLE OF AUTHORITIES CITED

CASES

	Page
Ames v. *Kansas*, 111 U. S. 449 (1884)	8
Bush v. *Orleans Parish School Board*, 188 F. Supp. 916	7
California v. *Southern Pacific Co.*, 157 U. S. 229 (1894)	12
Case v. *Bowles*, 327 U. S. 92 (1946)	8
Colorado v. *United States*, 219 F. 2d 474, Tenth Circuit (1954)	7
Monaco v. *Mississippi*, 292 U. S. 313 (1934)	11
United States v. *Alabama*, 267 F. 2d 808 (1959)	4, 5
United States v. *Arizona*, 214 F. 2d 389, Ninth Circuit (1954)	6, 12
United States v. *California*, 297 U. S. 175 (1936)	8
United States v. *Ingram*, 99 F. Supp. 465 (E.D. Ark. 1951)	7
United States v. *Minnesota*, 113 F. Supp. 488, 490 (D.Minn. 1953)	7
United States v. *Washington*, 233 F. 2d 811, Ninth Circuit (1956)	6, 7
United States v. *Wyoming*, 195 F. Supp. 692	7

CODES AND STATUTES

28 U.S.C. (1946 Ed. Sec. 341)	8
28 U.S.C. Sec. 1251(b)	2, 4, 8
28 U.S.C. Sec. 1254(1)	2
28 U.S.C. Sec. 1331	7
28 U.S.C. Sec. 1343	7
28 U.S.C. Sec. 1345	2, 3, 4, 6, 7
28 U.S.C. Sec. 1351	6
28 U.S.C. Sec. 1355	7
28 U.S.C. Sec. 2201	7
28 U.S.C. Sec. 2281	7
Civil Rights Act of September 9, 1957, 71 Stat. 637	5
Civil Rights Act of May 6, 1960, 74 Stat. 86	5
28 U.S.C. Sec. 687, R.S. (1875)	9

CONSTITUTIONS

United States Constitution, Article III, Sec. 2	10

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on February 28, 1964.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the United States District Court, Southern District of California, Central Division, printed in Appendix A hereto, is reported in 208 F. Supp. 861.

The opinion of the United States Court of Appeals for the Ninth Circuit, printed in Appendix B hereto, number 18,246 was not printed as of the date this petition was printed.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 28, 1964. Petitioner seeks to invoke the jurisdiction of this court under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Whether a state of the union may be sued in a federal district court without its consent on a nonfederal question in the absence of specific legislation directing such a suit; and whether existing federal statutes (28 U.S.C. 1345 and 28 U.S.C. 1251(b)) may be read together in order to vest a part of the Supreme Court's original jurisdiction in the district courts.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of Article III of the Constitution and 28 U.S.C. 1251 and 28 U.S.C. 1345 are set forth in Appendix C.

STATEMENT

This case arises out of the construction of a state highway through the Angeles National Forest by the State of California, Department of Public Works, Di-

vision of Highways, using prison labor. On November 21, 1957, while work was proceeding on a steep grade the prisoners were allowed (pursuant to federal government special use permit dated July 3, 1947,) to light fires within closed warming stoves on the grade. Due to winds of unusual velocity the prisoners were taken off the grade temporarily awaiting orders to resume work. During this period the warming stove was blown over by the wind. A small brush fire resulted which was contained by the inmates working under the direction of state highway employees. Upon notification of this brush fire the United States Forest Service arrived at the site and assumed control of firefighting operations. Firefighting at this time came to a halt because the United States Forest Service was unable to put into operation its own firefighting equipment. Approximately 2½ hours after the United States Forest Service assumed control of cleanup operations the brush fire was spread by high winds into the forest at large.

On April 10, 1962, 4½ years after the fire, the United States filed a complaint in federal district court alleging negligence of state employees in causing the fire which consumed 24,000 acres of the Angeles National Forest. Damages claimed by the United States total $479,194.43.

The complaint alleged jurisdiction under 28 U.S.C. 1345. On April 17, 1962, the district court issued a *sua sponte* order to show cause why the action should not be dismissed for lack of jurisdiction. Hearing on the

matter was held April 30, 1962, and the case was dismissed for lack of jurisdiction.

An appeal to the United States Court of Appeals for the Ninth Circuit was perfected by the United States. The court of appeals on February 28, 1964, reversed the district court, thereby holding that the district court had jurisdiction to hear an action brought by the United States against a state in a federal district court. The crux of the circuit court's decision was its determination that 28 U.S.C. 1345 was sufficient to confer jurisdiction on the district court. This result was achieved by reading 28 U.S.C. 1345 in conjunction with 28 U.S.C. 1251(b), which declares that the Supreme Court's original jurisdiction over actions by the United States against a state is not exclusive.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the Ninth Circuit (Appendix B) is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Alabama*, 267 F. 2d 808 (1959). This conflict was tacitly conceded by the court below in the instant case (Appendix B, p. 45, footnote 44). It was petitioner's position in the lower court that an express act of Congress was necessary to confer jurisdiction on the district court, and that 28 U.S.C. 1345, which grants to the district court jurisdiction over all civil actions brought by the United States, did not include within its scope a

state of the union because the state was not expressly mentioned by statute.

In *United States* v. *Alabama*, 267 F. 2d 808 (1959), suit was brought in the district court under Section 1971(c) of the Civil Rights Act of 1957. Under the language of that statute actions were to be brought in federal district court to enforce the act and the act was said to apply to "all persons." Suit was brought in the federal district court against state officials and the State itself as violators of the Civil Rights Act. The State of Alabama contended that the district court lacked jurisdiction because the term "all persons" did not expressly include the State of Alabama thus subjecting it to suit in the district court. The district court dismissed the case for lack of jurisdiction as to all parties. The United States appealed the matter to the Fifth Circuit Court of Appeals, and that court found that the district court lacked jurisdiction in the absence of express congressional legislation subjecting the state to suit in federal court. Pending the United States government's appeal to the Supreme Court Congress acted on the matter and expressly subjected the state to suit under the Civil Rights Act (act of May 6, 1960, 74 Stat. 86).

Petitioner is of the opinion that the Fifth Circuit Court of Appeals made the only proper disposition of the case, and that the instant case should follow the same pattern. Congress if it so desires may provide within the comprehensive plan for jurisdiction

of lower federal courts a specific statute divesting the Supreme Court of a share of its original jurisdiction and conferring that jurisdiction on a district court. This has been the accepted method in the past.[1] It should be noted that only by congressional action are the states, through their elected representatives, able to exercise some degree of control in regard to what their role will be in the federal system. Without further congressional action there is a significant diminution of state's rights.

2. The questions presented are of major importance to every state of the union. In many ways (the paramount interest being fiscal in nature) a state represents its people in the same sense that a class action represents a large group of litigants not before the court. In the present case, California represents the interests of the other 49 states, each of which will be equally affected by the final determination in the instant case. From the standpoint of numbers as well as legal precedent the subject case represents a question of major importance requiring the Supreme Court's final decision.

While several cases have assumed that 28 U.S.C. 1345 confers jurisdiction on the district court of actions by the United States against a state[2] few

[1] See 28 U.S.C. 1351 and *United States* v. *Alabama*, 267 F. 2d 808 (1959).

[2] *United States* v. *Washington*, 233 F. 2d 811, Ninth Circuit (1956); *Colorado* v. *United States*, 219 F. 2d 474, Tenth Circuit (1954); other cases cited in footnote 40 of the Ninth Circuit Court of Appeals decision, Appendix B, p. 44; but c.f. *United States* v. *Arizona*, 214 F. 2d 389, Ninth Circuit (1954).

cases have discussed the issue. However, the cases that have discussed the issue are distinguishable from the case at bar.[3]

Contrary to the decision of the court of appeals in the instant case, petitioner is of the opinion that 28 U.S.C. 1345 was never intended to confer a part of the Supreme Court's original jurisdiction on the district courts. This argument is based on the history of the statutory predecessors to Section 1345.[4] That history clearly indicates that 28 U.S.C. 1345 is a distribution of the Supreme Court's appellate jurisdiction which has provided federal trial courts with original jurisdiction over federal question cases, diversity jurisdiction and where the United States is a plaintiff. On the other hand, from 1789 until 1948

[3] *United States* v. *Washington*, 233 F. 2d 811, Ninth Circuit (1956), involved a federally protectable interest (U.S. as trustee of Indians).

Colorado v. *United States*, 219 F. 2d 474, Tenth Circuit (1954), jurisdiction was partly based on 28 U.S.C. 1355.

United States v. *Wyoming*, 195 F. Supp. 692, involved a quiet title action to federal land and 28 U.S.C. 2201 provided a jurisdictional basis.

Bush v. *Orleans Parish School Board*, 188 F. Supp. 916, jurisdiction based on 28 U.S.C. 1331, 28 U.S.C. 1343(3) and 28 U.S.C. 2281.

United States v. *Minnesota*, 113 F. Supp. 488, 490 (D. Minn. 1953), also a quiet title action, i.e., suit to declare federal property immune from state tax.

United States v. *Ingram*, 99 F. Supp. 465, 468 (E.D. Ark. 1951), also federally protectable interest, navigable river.

[4] Opinion of the district court, Appendix A, p. 23.

the Supreme Court by statute had exclusive original jurisdiction where a state was a party.[5]

When 28 U.S.C. 1251(b) was enacted in 1948, providing that the Supreme Court's original jurisdiction of actions such as the one at bar was no longer exclusive, no change was made in the statute regarding the jurisdiction of the federal trial courts. The United States now urges that the jurisdiction of the federal trial courts has been enlarged when, in fact, there has been no direct congressional action upon the subject.

In regard to the authority necessary for Congress to act on the Supreme Court's original jurisdiction, petitioner urges that respondent has offered scant authority to support its position. Respondent's position is based solely on the dicta of *Ames* v. *Kansas*, 111 U.S. 449 (1884), which allegedly gives Congress a free hand to deal with the Supreme Court's original jurisdiction. Petitioner is of the opinion that the clarity of the holding in *Ames* is subject to serious criticism although appellate courts have assumed the correctness of that opinion for 90 years. The ambiguity

[5] See opinion of the circuit court, Appendix B, footnotes 18 and 44 discussing 28 U.S.C. 341, and the exceptions to it where special jurisdictional statutes existed, as in *Case* v. *Bowles*, 327 U.S. 92 (1946); *U.S.* v. *California*, 297 U.S. 175 (1936), and others.

The rationale of these cases has been twofold: (1) That the special jurisdictional statutes as a later expression of legislative will should control vis-a-vis the earlier statutory grant of exclusive jurisdiction to the Supreme Court. (2) That the district court had original jurisdiction when the subject matter of the controversy was such as to call for the protection and enforcement of federal rights and powers under the supremacy clause. Opinion of the district court, Appendix A, p. 21.

of the dicta in *Ames* can best be illustrated by its conflicting language, to wit:

> (a) (at page 469) ". . . we are unable to see that it is not within the power of congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction."
>
> (b) (at page 470) ". . . and here it is to be remarked that there is nothing in this which manifests an intention to interfere with the exclusive original jurisdiction of the Supreme Court as established by the Act of 1789 and continued by Section 687 of the Revised Statutes."

Petitioner believes that the issue in *Ames* was whether the federal question jurisdiction of the federal trial court (itself a distribution of the Supreme Court's appellate jurisdiction) was broad enough to include actions in which the State was also a party. The underlying constitutional issue was whether the original and the appellate jurisdiction were mutually exclusive of one another, and not whether Congress could constitutionally act upon the original jurisdiction and distribute it to the district court. This proposition is borne out by the fact that 28 U.S.C. 687, in effect at the time of the *Ames* decision, made the original jurisdiction of the Supreme Court exclusive where a state was a party.

In regard to the issue of the necessity of consent to suit by the state, petitioner feels that the opinion of the Ninth Circuit Court of Appeals does not accurately reflect petitioner's argument on the question.

In the Court of Appeals for the Ninth Circuit petitioner did not claim that lack of consent to suit would totally deprive federal courts of jurisdiction. Clearly the states, by admittance to the union and ratification of the Constitution, consented to suit in the Supreme Court. The only remaining question for decision is whether this consent to suit in the Supreme Court also included consent to suit in all inferior federal courts.

Petitioner disagrees with the rationale of the Ninth Circuit Court of Appeals[6] that an earlier draft of Article III, Section 2 of the Constitution indicated the intention of the framers to allow Congress to distribute *all* of the judicial power. This was *not* the language ratified by the states, and, secondly, the proposed language requires unsupported inference to reach the conclusion that the framers meant the final draft to have the same meaning as the proposed draft. Moreover, it is an exaggeration to suggest that by absenting the states from the district court the federal government will be deprived of access to any federal forum. The federal government still may institute original proceedings in the Supreme Court, or actions may be brought under special jurisdiction statutes as has been done in the past. Finally, Congress might decide by express legislation to subject the states to suit in federal district court in cases such as the instant case.

[6] See page 5, opinion of the Ninth Circuit Court of Appeals, footnote 16, Appendix B, p. 34.

This last point goes to the heart of petitioner's case. So long as Congress acts, the issue of consent is moot, in that the Members of Congress, responsive to state needs, and representing the interests of the states at the federal level have consented by their votes. If deprived of this protection the states have no voice whatsoever at the federal level, and the duality of governments thought to be inherent in the federal system is a myth.

As to the burden that would fall upon the Supreme Court by having to hear purely factual cases, this is obviated by the appointment of a special master. There is also to be weighed against this burden, the burden of subjecting the states to suit on nonfederal questions in the district courts.

Finally, petitioner believes that its position is supported by competent authority. In *Monaco* v. *Miss.*, 292 U.S. 313 (1934), there is language which would serve as a caveat to those who would stretch the meaning of the states' consent to suit in the Supreme Court:

> "Although a case may arise under the Constitution and the laws of the U. S., the judicial power does not extend to it if the suit is sought to be prosecuted against a state without her consent. . . . There is still the postulate that states of the Union, still possessing the attributes of sovereignty shall be immune from suits without their consent, save where there has been a surrender of this immunity in the plan of the convention."

More recently, a similar problem arose in *United States* v. *Arizona*, 214 F. 2d 389 (1954), which provoked the following expression from the court:

> "It may be that Congress did not intend to go further than to give the U. S. a right over Arizona if private citizens have such a right. Under express acts of Congress a state must give way to the Federal government, but, is it necessary to the exercise of any paramount federal right to hold the states are stripped of their immunity from suit if they have not chosen to waive it?"

CONCLUSION

Petitioner's argument is best summarized as follows:

(1) The original jurisdiction conferred on the Supreme Court in actions where a state is a party is self-executing. *California* v. *Southern Pacific Co.*, 157 U.S. 229 (1894).

(2) No congressional act has been passed which would directly confer jurisdiction on the district court and change the self-executing grant of the Constitution.

(3) Without congressional action the states are deprived of their rightful role in the federal system in regard to a decision which might seriously affect them.

(4) The United States has not established clear constitutional authority for Congress to delegate the Supreme Court's original jurisdiction to the district court.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

Original filed Sept. 14, 1962

Clerk, U.S. District Court
Southern District of California

By B. T. Ericksen, Deputy

Nunc pro tunc as of April 30, 1962

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff v. STATE OF CALIFORNIA, Defendant	CIVIL No. 62-521-WM

Memorandum of Decision

MATHES, District Judge:

Plaintiff United States of America invoked the jurisdiction of this Court under 28 U.S.C. § 1345, seeking damages from defendant, the State of California, by reason of alleged negligence on the part of employees of the State in causing, and in failing to extinguish, a fire which destroyed trees and other vegetation covering approximately 24,000 acres within Angeles National Forest in the County of Los Angeles, California.

It is alleged in plaintiff's complaint that "on November 21, 1957, the . . . Division of Highways of the State of California was engaged in constructing a highway upon lands of the United States of America, within the Angeles National Forest"; that at said time and place an employee of the State Division of Highways negligently kindled a fire in a warming stove while aiding in the road construction; that the foreman of the highway construction crew, "acting within the scope of his employment", ordered the crew members to leave the construction site, and strong winds in the highway area thereafter overturned the stove, causing the fire to spread into the adjacent forest; that shortly thereafter other employees of the State Division of Highways arrived, attempted to extinguish the blaze, "but did so negligently", with the result that the fire continued to rage, and the Federal Government was "compelled to expend the approximate sum of $455,194.43 to suppress said fire". It is also alleged that "plaintiff sustained damages to national forest resources".

At a hearing held in response to an order to show cause why the action should not be dismissed pursuant to Rule 12(h) of the Federal Rules of Civil Procedure, the State of California asserted sovereign immunity to suit in this Court upon the claim here alleged.

It has long been the rule in California that the State is immune from private suit, based upon negligent conduct of its agents, where the public activity involved is deemed essentially "governmental" in nature. [See: *People* v. *Superior Court*, 29 C. 2d 754, 761-762, 178 P. 2d 1, 5 (1947); *Plaza* v. *City of San Mateo*, 123 C. A. 2d 103, 106, 266 P. 2d 523, 525

(1954.] Road construction by California's Division of Highways has been held to be a "governmental" function, as distinguished from a "proprietary undertaking or business". [See *Bettencourt* v. *State*, 123 C. A. 2d 60, 63, 266 P. 2d 201, 203 (1954); *cf.*: *Gibson Properties Co.* v. *City of Oakland*, 12 C. 2d 291, 301, 83 P. 2d 942, 947 (1938); *Yonker* v. *City of San Gabriel*, 23 C. A. 2d 556, 558-559, 73 P. 2d 623, 624 (1937).] And since the cause of action here asserted by the Federal Government accrued in November of 1957, California would be clearly immune from suit under the circumstances alleged, had the action been brought by a private individual in the State court. [Cal. Civ. C. § 22.3; see *Corning Hospital Dist.* v. *Superior Court*, 57 A. C. 529, 370 P. 2d 325, 20 Cal. Rptr. 621 (1962); *and see*: Cal. Gov. C. §§ 800-803, § 1953, § 53051.]

The question for decision, then, and one of first impression it appears, is whether a Federal district court has jurisdiction, at the suit of the Federal Government, to impose liability upon a State for damages caused by allegedly tortious conduct of the State's agents, in a case where the State is an involuntary defendant—is sued without sovereign consent.

Since any Federal court possesses "no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears". [*Grace* v. *Am. Cent. Ins. Co.*, 109 U.S. 278, 283 (1883); see: *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 382 (1902).] As Mr. Chief Justice Ellsworth pointed out in the beginning: "A circuit [district] court . . . is of limited

jurisdiction: and has cognisance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction, until the contrary appears." [*Turner* v. *Bank of North America,* 4 U.S. (4 Dall.) 8, 11 (1799); *Shamrock Oil Co.* v. *Sheets,* 313 U.S. 100, 108-109 (1941).]

Underlying all Congressional enactments dealing with Federal-court jurisdiction is Article Three of the Constitution, which declares, *inter alia,* that: "The judicial power shall extend . . . to controversies to which the United States shall be a party . . . ." [U.S. Const. art. 3, § 2, cl. 1.] The same Article divides this judicial power among the Federal courts, providing in the first instance that the Supreme Court of the United States shall have original jurisdiction "In all cases . . . in which a State shall be party . . ." [U.S. Const. art. 3, § 2, cl. 2; see *Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439, 464 (1945)]; for it was thought that the establishment of a high court, with its consequent authority to determine controversies involving States of the Union, was "essential to the peace of the Union". [*Monaco* v. *Mississippi,* 292 U.S. 313, 328 (1934).]

Indeed, Alexander Hamilton, at the time of New York's ratification convention in 1788, urged that: "In cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal." [*The Federalist No. 81,* at 548 (Cooke ed. 1961).]

However, the question soon arose whether the "original jurisdiction" granted by the Constitution to the Supreme Court was meant to be exclusive. [See: *United States* v. *Ravara,* 2 U.S. (2 Dall.) 297 (1793); *Osborn* v. *United States Bank,* 22 U.S. (9 Wheat.) 738, 821 (1824).] And by 1884 the Supreme Court had held that the Court's original jurisdiction is "not necessarily exclusive, and . . . the subordinate courts of the Union may be invested with jurisdiction" by the Congress, in cases concerning consuls or vice-consuls of foreign governments. [*Börs* v. *Preston,* 111 U.S. 252, 256-257 (1884).]

The proposition that the Congress has the power to confer original jurisdiction upon inferior Federal courts, concurrent with that conferred by the Constitution upon the Supreme Court, was grounded largely upon this fact: that the First Congress, the leading members of which had recently come from the Constitutional convention, in effect assumed the prerogative by including in the first Judiciary Act the provision that the Supreme Court "shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction . . . ." [Judiciary Act of 1789 § 13, 1 Stat. 80 (1789); *cf.: Williams* v. *United States,* 289 U.S. 553, 573-574 (1933); *Ames* v. *Kansas,* 111 U.S. 449, 464 (1884).]

This Congressional pronouncement of 1789 was in substance re-enacted in the Judicial Code of 1911 [36 Stat. 1156 (1911)], and was retained in 28 U.S.C. § 341 until revision in 1948. [See 28 U.S.C. § 1251.]

Moreover, the First Congress, while declaring in § 13 that the Supreme Court generally had exclusive

jurisdiction of all cases wherein a State was a party, at the same time expressly conferred upon the circuit (trial) courts of the United States original jurisdiction of "all suits of a civil nature . . . where . . . the United States are plaintiffs . . . ." [Judiciary Act of 1789 § 11, 1 Stat. 78 (1789).]

Throughout their long history, the trial courts of the United States have retained this same "original jurisdiction" of all civil cases wherein "the United States are plaintiffs". [See: Act of March 3, 1875 § 1, 18 Stat. 470, as amended, 24 Stat. 552 (1887) and 25 Stat. 434 (1888); Judicial Code of 1911 § 24, 36 Stat. 1091 (1911); 28 U.S.C. § 41(1), as amended, *id.* § 1345 (1948).] So it is that § 1345 of Title 28 of the United States Code now stipulates that: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States . . . ." [*Ibid.*]

The grant to Federal trial courts of "original jurisdiction of all civil actions . . . commenced by the United States" has never been displaced, but has always existed concurrently with the grant to the Supreme Court of exclusive original jurisdiction of civil cases where a State is a party. And what appears gradually to have evolved is the view that the Supreme Court has always retained exclusive original jurisdiction of all civil actions commenced by the United States against a State, excepting only those cases wherein the Congress has, by grant within the ambit of Constitutional power, specifically conferred concurrent jurisdiction upon the Federal district courts. [*Cf.*: *Case* v. *Bowles*, 327 U.S. 92, 97 (1946); *United States* v. *California*, 297 U.S. 175, 187-188 (1936); *Alabama* v. *United States*, 304 F. 2d 583, 584 (5th Cir.

1962); *United States* v. *Montana,* 134 F. 2d 194, 196 (9th Cir.), *cert. denied,* 319 U.S. 772 (1943); *Minnesota* v. *United States,* 125 F. 2d 636, 639 (8th Cir. 1942); *California* v. *United States,* 91 F. Supp. 722, 723 (N.D. Cal. 1950); compare *United States* v. *Louisiana,* 123 U.S. 32 (1887).]

Consistent with this view, Federal district courts have assumed original jurisdiction also of civil actions wherein a State was a party and the matter in controversy was such as to call for protection and enforcement of Federal rights and powers under the supremacy clause [see U.S. Const. art. 6, § 2] against encroachment by a State, as where the Federal taxing powers [see *New York* v. *United States,* 326 U.S. 572 (1946)], or the Federal war powers [see *United States* v. *City of Philadelphia,* 56 F. Supp. 862 (E.D. Pa. 1944), *aff'd,* 147 F. 2d 291 (3rd Cir.), *cert. denied,* 325 U.S. 870 (1945)], were threatened. [See also: *Board of Trustees* v. *United States,* 289 U.S. 48 (1933); *United States* v. *Newhard,* 128 F. Supp. 805 (W.D. Pa. 1955); *United States* v. *Ingram,* 99 F. Supp. 465 (E.D. Ark. 1951), *rev'd on other grounds,* 203 F. 2d 91 (8th Cir.), *cert. denied,* 345 U.S. 995 (1953); *United States* v. *Lewis,* 10 F. Supp. 471 (W.D. Ky. 1935).]

Indeed, the *cause celebre* of *Ames* v. *Kansas, supra,* 111 U.S. 449, was just such a case. There, the United States Supreme Court held that a suit brought by Kansas in the highest court of that State was subject to removal to the Federal circuit [district] court, over the objection of the State, since the matter in controversy (the validity of a railroad consolidation authorized by Act of Congress) arose under the laws of the United States, "the supreme law of the land". [See: U.S. Const. art. 6, § 2; *Ames* v. *Kansas, supra,* 111 U.S. at 470-472.] So the oft-cited dictum of Mr.

Chief Justice Waite, to the effect that the Congress possesses power to vest inferior Federal courts with concurrent jurisdiction "in cases where the Supreme Court has been vested by the Constitution with original jurisdiction" [*Ames* v. *Kansas, supra,* 111 U.S. at 469], must always be viewed *ex integro* "in connection with the case in which those expressions are used". [See: *Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264, 399 (1821); *Armour & Co.* v. *Wantock,* 323 U.S. 126, 132-133 (1944); *Julian Petroleum Corp.* v. *Courtney Petroleum Co.,* 22 F. 2d 360, 362 (9th Cir. 1927).]

With the 1948 revision of the Judicial Code, there was enacted § 1251, entitled "Original Jurisdiction", which provides that:

> "(a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> "(1) All controversies between two or more States . . . .
>
> "(b) The Supreme Court shall have original but not exclusive jurisdiction of: . . .
>
> "(2) All controversies between the United States and a State . . . ."
>
> [28 U.S.C. § 1251.]

By this revision, there was included in the nonexclusive category of Supreme Court jurisdiction "All controversies between the United States and a State". [28 U.S.C. § 1251(b)(2).] It has been suggested, moreover, that this legislative change may have eliminated, perhaps unwittingly, the necessity for further enactment by the Congress to confer upon Federal district courts concurrent jurisdiction in civil actions brought against a State by the Federal Government, and that

28 U.S.C. § 1345 can now properly be construed to subject the States generally to the jurisdiction of the inferior Federal courts in actions brought by the United States, to the extent Constitutionally permissible. [See: Reviser's Note to 28 U.S.C.A. § 1251; Hart & Wechsler, *The Federal Courts and the Federal System* 228 (1953); Wagner, *The Original and Exclusive Jurisdiction of the United States Supreme Court*, 2 St. Louis U.L.J. 111, 117 (1952).]

In keeping with this view, the United States urges here that, inasmuch as the original jurisdiction of the Supreme Court has now been declared by the Congress to be non-exclusive as to "All controversies between the United States and a State" [28 U.S.C. § 1251(b)(2)], the longstanding grant to the Federal district courts of "original jurisdiction of all civil actions . . . commenced by the United States" [28 U.S.C. § 1345] necessarily extends by implication to actions, such as the case at bar, brought by the United States against a State.

It is significant to note, however, that no material change in language was made upon enactment in 1948 of § 1345 as successor to 28 U.S.C. § 41(1). [See Reviser's Note to 28 U.S.C.A. § 1345.] So the fact that the original jurisdiction of the Supreme Court was declared in the revision to be non-exclusive with respect to "controversies between the United States and a State" [28 U.S.C. § 1251] does not argue the conclusion that 28 U.S.C. § 1345 and its predecessor-provisions should now be taken to include actions based upon the tortious conduct of a State's agents. To the contrary, such a construction must be rejected, not only because of serious doubts as to Constitutional validity, later to be mentioned, but also because reen-

actment in the revision of the language contained in § 1345 is persuasive evidence itself that this section should continue to be interpreted "as before construed". [*Cf.: Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 500 (1933); *Van Vranken* v. *Helvering*, 115 F. 2d 709, 710 (2nd Cir. 1940), *cert. denied*, 313 U.S. 585 (1941).]

"As before construed", 28 U.S.C. § 1345 has been held to provide the jurisdictional basis for actions in tort brought by the United States against private individuals. [See: *United States* v. *Borin*, 209 F. 2d 145, 148 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954); *United States* v. *Butt*, 203 F. 2d 643 (10th Cir. 1953); *United States* v. *Silliman*, 167 F. 2d 607, 610 (3rd Cir.), *cert. denied*, 335 U.S. 825 (1945); *Pooler* v. *United States*, 127 Fed. 519, 520 (1st Cir. 1904); *United States* v. *Andrews*, 206 F. Supp. 50 (D. Idaho 1961); *cf. United States* v. *Sayward*, 160 U.S. 493 (1895); *and see Cotton* v. *United States*, 52 (11 How.) 229, 231 (1850).]

Too, the provisions of § 1345 have been held to include, within the original jurisdiction of Federal district courts, actions brought by the Federal Government against States as involuntary defendants, where the matter in controversy involved the protection and enforcement of the interests of the United States in real property in accordance with Federal law [see *United States* v. *Washington*, 233 F. 2d 811, 813-814 (9th Cir. 1956); *and see: Brewer Oil Co.* v. *United States*, 260 U.S. 77, 79 (1922); *Utah* v. *United States*, 304 F. 2d 23 (10th Cir. 1962); *United States* v. *Carbon County Land Co.*, 46 F. 2d 980, 987 (10th Cir. 1931), *aff'd, Utah* v. *United States*, 284 U.S. 534 (1932); *United States* v. *Ladley*, 51 F. 2d 756 (D.

Idaho 1931)], notwithstanding that such actions have also long been prosecuted as a matter of course in the United States Supreme Court. [See: *United States* v. *California*, 332 U.S. 19 (1947); *United States* v. *West Virginia*, 295 U.S. 463 (1935); *United States* v. *Oregon*, 295 U.S. 1 (1935); *United States* v. *Minnesota*, 270 U.S. 181 (1926); *United States* v. *Michigan*, 190 U.S. 379 (1903); *United States* v. *Texas*, 143 U.S. 621 (1892); see also *United States* v. *North Carolina*, 136 U.S. 211 (1890).]

But extensive research has failed to reveal a single decision, throughout the long history of 28 U.S.C. § 1345 and its predecessors, construing the grant of jurisdiction "of all civil actions . . . commenced by the United States" to include within Federal district-court jurisdiction actions brought by the United States against a State as involuntary defendant to recover, as here, damages based upon mere tortious conduct of agents of the State. [Compare *City of Newark* v. *United States*, 254 F. 2d 93 (3rd Cir. 1958).] To compel a State to submit to such an action in a district court of the United States would, indeed, deprive the Constitutionally-prescribed apportionment of jurisdiction among the Federal courts of any effective meaning at all [see U.S. Const. art. 3, § 2, cl. 1 and 2], in the face of the long-accepted qualification that the Congress can "neither enlarge nor restrict the original jurisdiction" of the Supreme Court. [*California* v. *Southern Pacific Co.*, 157 U.S. 229, 261 (1895); see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173-174 (1803).]

From the birth of this Nation, it has been recognized that "States of the Union, still possessing attributes of sovereignty, shall be immune from suits with-

out their consent, save where there has been 'a surrender of this immunity in the plan of the convention' ". [*Monaco* v. *Mississippi, supra,* 292 U.S. at 322-323; see *The Federalist No. 82,* at 553-554 (Cooke ed. 1961) (Hamilton).] And there has been accorded to the States protection "from the compulsory process of any court other than one suited to their high positions". [*Ames* v. *Kansas, supra,* 111 U.S. at 465.]

Furthermore, since State immunity is "like that of the United States" [*United States* v. *Minnesota, supra,* 270 U.S. at 195], the "surrender of this immunity" within the scope of the Constitution should never be lightly implied. [*Soriano* v. *United States,* 352 U.S. 270, 276 (1957).] Otherwise, the question of what "attributes of sovereignty" are retained by a State upon entry into the Federal Union would surely be reduced to the status of an academic exercise.

There has been no claim that California, by entry into the Union, consented under the Constitution to submit to the jurisdiction of a Federal district court in an action by the United States for damages allegedly caused by tortious conduct of the State's agents. Nor is it contended that any Constitutional right or power of the Federal Government—any "supreme law of the land"—has been threatened or impaired by the State of California in the circumstances at bar. It therefore appears that California, having made no waiver, may steadfastly rely upon a State's Constitutional right of sovereign immunity from suit by the United States in this Court on the claim here asserted.

Section 1345 of Title 28 of the United States Code should always be read with the admonition in mind that: "A restrictive meaning for what appear to be plain words may be indicated by the Act as a whole,

by the persuasive gloss of legislative history or by the rule of constitutional adjudication . . . that such a restrictive meaning must be given if a broader meaning would generate constitutional doubts". [*United States* v. *Witkovich*, 353 U.S. 194, 199 (1957); see: *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749 (1961); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358, 365 (9th Cir. 1955).]

There is no mention in the language of § 1345 of a State as a party defendant, while § 1251(b) merely describes in general terms the non-exclusive nature of the Supreme Court's jurisdiction. So there is nothing in the language of these provisions to compel the inclusion of a State as involuntary defendant within the original jurisdiction of the Federal district courts, in an action brought by the United States upon a claim for damages caused by alleged tortious conduct of agents of the State.

I am of the opinion therefore that both the language and the legislative background of 28 U.S.C. §§ 1345 and 1251(b), as well as serious Constitutional doubts as to the power of the Congress to do otherwise, require that "a restrictive meaning must be given" to those statutes, whether read singly or together. Accordingly I hold that, when interpreted in the light of history and viewed within the framework of the Constitution, 28 U.S.C. § 1345 does not confer upon a Federal district court jurisdiction over a State in a civil action brought by the United States to recover from the State damages resulting from negligence of State agents, absent a waiver of the State's sovereign immunity.

It follows that this cause must be dismissed for lack of jurisdiction over both the person of the defendant and the subject matter of the action. [See Fed.R.Civ.P. 12(b) (1) and (2) and 12(h), 28 U.S.C.A.]

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* vs. STATE OF CALIFORNIA, *Appellee.*	No. 18,246 (Feb. 28, 1964)

Appeal from the United States District Court for the Southern District of California Central Division

Before: HAMLEY and BROWNING, Circuit Judges, and MacBRIDE, District Judge

BROWNING, Circuit Judge:

The United States sued the State of California in the District Court to recover losses resulting from allegedly negligent acts of State employees in starting a fire in a national forest, and in attempting to extinguish it. The complaint was filed under 28 U.S.C.A. Sec. 1345, which grants to district courts original jurisdiction over "all" civil actions commenced by the United States.[1]

[1] 28 U.S.C.A. Sec. 1345 provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Concededly, in the present instance no Act of Congress "otherwise provided."

The District Court dismissed the action on the ground that Section 1345 "does not confer upon a federal district court jurisdiction over a State in a civil action brought by the United States to recover from the State damages resulting from negligence of State agents, absent a waiver of the State's sovereign immunity."[2]

I

The District Court read this exception into the language of Section 1345 in part because the court entertained "serious Constitutional doubts" as to the power of Congress to extend the jurisdiction of district courts to suits by the United States against a State without the State's specific consent unless a federal question is presented.[3]

It is not clear whether the asserted lack of power pertains to all federal courts or only to those inferior to the Supreme Court. Nor is it clear whether an issue of federal supremacy is thought essential, or whether any kind of federal question will suffice.[4] Neither is it evident why a suit by the United States to collect damages from the State for injury to the national

[2] United States v. California, 208 F.Supp. 861, 867 (S.D. Cal. 1962).

[3] Ibid.

[4] The District Court apparently felt an issue of the latter kind was required, but that this constitutional limitation applied only to inferior federal courts. 208 F.Supp. at 864-65. We have ourselves suggested that an issue of "paramount federal right" might be prerequisite to exercise of federal judicial power against a State without its consent, but have rejected the notion that such a requirement, if it existed, would apply only to the lower federal courts. United States v. Arizona, 214 F.2d 389, 394 (9th Cir. 1954). See also Colorado v. United States, 219 F.2d 474, 476-77 (10th Cir. 1954).

forests does not meet any subject-matter limitation which may be thought to exist.[5]

It is unnecessary to consider these problems, however, for we are satisfied that the Constitution grants original jurisdiction to the Supreme Court over civil suits brought by the United States against a State without specific consent regardless of the nature of the controversy, provided the issue is justiciable, and that the Constitution empowers Congress to confer upon the district courts concurrent jurisdiction over such suits.

A. *The Supreme Court*

Article III,[6] Section 2, Clause 1 of the Constitution extends the federal judicial power "to controversies to which the United States shall be a Party."

[5] Compare Utah Power & Light Co. v. United States, 243 U.S. 389 (1917), with Cotton v. United States, 52 U.S. (11 How.) 229 (1850). Cf. United States v. Standard Oil Co., 332 U.S. 301 (1947).

[6] The portions of Art. III pertinent to this appeal read as follows:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Clause 2 vests the Supreme Court with original jurisdiction over "all cases . . . in which a State shall be a Party." Since the latter grant does not exclude cases in which the United States is the opposite party, the Supreme Court has original jurisdiction over suits by the United States against a State. Each State impliedly consented to such suits "when admitted into the Union upon an equal footing in all respects with the other States," and no further consent is needed. *United States v. Texas,* 143 U.S. 621, 646 (1892).[7] Accordingly, the Supreme Court has repeatedly entertained suits by the United States against a State, without the State's consent.[8]

Moreover, the jurisdiction of the Supreme Court extends to suits by the United States against a State "without regard to the subject of such controversies" (*United States v. Texas,* 143 U.S. at 646) for "it is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends 'on the character of the cause, whoever may be the parties,'[9] and, in the other, on the charac-

[7] See also United States v. Louisiana, 339 U.S. 699, 701-02 (1950); Wright on Federal Courts 437 n.24 (1963). Cf. Monaco v. Mississippi, 292 U.S. 313, 329 (1934).

[8] See, e.g., United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950); United States v. California, 332 U.S. 19 (1947); United States v. Wyoming, 331 U.S. 440 (1947); United States v. Alamaba, 313 U.S. 274 (1941); United States v. Oregon, 295 U.S. 1 (1935); United States v. Arizona, 295 U.S. 174 (1935); United States v. West Virginia, 295 U.S. 463, 470 (1934); United States v. Utah, 283 U.S. 64 (1931); United States v. Minnesota, 270 U.S. 181 (1926); United States v. Oklahoma, 261 U.S. 253 (1923); United States v. Michigan, 190 U.S. 379 (1903); United States v. Texas, 143 U.S. 621 (1892); United States v. Louisiana, 136 U.S. 211 (1890). See also 11 Stan.L.Rev. 665, 701-04 (1959).

[9] Quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378, 393 (1821).

ter of the parties, whatever may be the subject of controversy." 143 U.S. at 643. There is no suggestion in any of the opinions in cases brought by the United States against a State in the Supreme Court that the subject matter of the controversy was relevant to the Court's jurisdiction.

The policy considerations underlying Supreme Court jurisdiction over such suits precludes the imposition of a subject-matter limitation. The jurisdiction exists because if it did not the United States would be forced to resort to the courts of the State which was resisting the federal claim (if, indeed, that State would permit suit against it in its own courts), or no means at all would be available for finally resolving the dispute short of an ultimate test of physical strength;[10] and neither of these alternatives is compatible with our constitutional scheme. The problem is the same whatever the nature of the controversy between the two governments. It therefore calls for the same solution without regard to the kind of question presented, provided the subject matter be justiciable and hence appropriate for judicial resolution.[11]

B. *Lower courts*

As a result of Convention compromise the Constitution vested in Congress discretion to establish such lower federal courts as it might think proper;[12] "and it seems to be a necessary inference from the express decision that the creation of inferior federal courts was to rest in the discretion of Congress that the scope

[10] United States v. Texas, 143 U.S. 621, 641 (1892); Wright, supra note 7, at 437.

[11] See e.g., Stern & Gressman, Supreme Court Practice 303 (3d ed. 1962); 11 Stan.L.Rev. 665, 696-98 (1959).

[12] U.S. Const., art. III, § 1, supra note 6. See Hart & Wechsler, The Federal Courts and the Federal System 17-18 (1953).

of their jurisdiction, once created, was also to be discretionary." Hart & Wechsler, The Federal Courts and the Federal System 18 (1953).[13]

The power of Congress to confer jurisdiction upon lower courts is not limited by the constitutional grant of original jurisdiction over certain cases to the Supreme Court.[14] "The true rule in this case is . . . [that] the grant of jurisdiction over a certain subject-matter to one court, does not, of itself, imply that that jurisdiction is to be exclusive." *Gittings v. Crawford*, 10 Fed.Cas. 447, 450 (No. 5465) (C.C.D. Md. 1838).[15] That this was in fact the intention of the framers appears from changes made in article III in the course of the Convention.[16]

Accordingly, the Supreme Court held in *Börs v. Preston*, 111 U.S. 252 (1884), that Congress may grant jurisdiction to lower courts over suits against aliens,

[13] Other circumstances drawn from the records of the Conventions confirm the inference. Hart & Wechsler, supra note 12, at 18; 38 N.Y.U.L. Rev. 405, 408 (1963).

[14] U.S. Const., art. III, § 2, cl. 2. See Wright, supra note 7, at 437 n. 23; Stern & Gressman, supra note 11, at 303-04; 1 Moore's Federal Practice 258 (1961) and 4 Moore's 46 (1951).

[15] Chief Justice Taney on circuit, quoted in Börs v. Preston, 111 U.S. 252, 260 (1884).

[16] The original draft of what is now § 2 of art. III began, "the jurisdiction of the Supreme Court shall extend" etc., in place of the present language, "The judicial power shall extend" etc. See note 6. The draft also contained an express provision that the Congress might assign (with an exception not pertinent here) jurisdiction over "any part" of the enumerated classes of cases to the lower federal courts. The assignment clause was deleted as unnecessary when the opening language was changed to the present form. Nonetheless it constitutes a direct verbalization of the intention of the framers that "any part" of the judicial power of the United States, including also that within the original jurisdiction of the Supreme Court, might be assigned by Congress to the lower federal courts. 2 Farrand, Records of the Federal Convention 172-73, 186-87, 425, 431 (1911); Prescott, Drafting the Federal Constitution 675 (1941).

including consuls, despite the provision of article III that "In all cases affecting . . . Consuls . . . the Supreme Court shall have original Jurisdiction." And at the same term the Court in *Ames v. Kansas*, 111 U.S. 449 (1884), concluded that the grant of original jurisdiction to the Supreme Court over cases "in which a State shall be a Party," does not preclude Congress from vesting concurrent jurisdiction over such actions in lower courts.[17] Since *Ames v. Kansas*, statutes granting jurisdiction to lower courts over suits by the United States under particular legislation have been repeatedly construed as including suits

[17] In Ames v. Kansas, 111 U.S. 449, 469 (1884), the Court said:

> In view of the practical construction put on this provision of the Constitution by Congress at the very moment of the organization of the government, and of the significant fact that from 1789 until now no court of the United States has ever in its actual adjudications determined to the contrary, we are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction. It rests with the legislative department of the government to say to what extent such grants shall be made, and it may safely be assumed that nothing will ever be done to encroach upon the high privileges of those for whose protection the constitutional provision was intended. At any rate, we are unwilling to say that the power to make the grant does not exist.

See also United States v. Louisiana, 123 U.S. 32, 36 (1887):

> In a recent case, Ames v. Kansas, 111 U.S. 449, this question was very fully examined, and the conclusion reached that the original jurisdiction of the Supreme Court, in cases where a State is a party, is not made exclusive by the Constitution, and that it is competent for Congress to authorize suits by a State to be brought in the inferior courts of the United States.

In United States v. Texas, 143 U.S. 621, 643 (1892), the Court noted that the circuit courts did not then have jurisdiction over such suits, not because of a want of congressional power to confer it, but because of a lack of legislation doing so. Cf. Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898). See Hart & Wechsler, supra note 12, at 218-19.

against a State and, as so interpreted, have been uniformly upheld.[18]

There is nothing to indicate that the power of Congress in this regard is limited by the subject matter of the controversy.

Since the character of the parties is a basis of federal judicial power distinct and independent from that of the nature of the controversy,[19] there is no logical reason why Congress may not treat these two heads of jurisdiction separately in distributing the judicial power to lower courts. And Congress has in fact done so from the beginning. Section 9 of the Judiciary Act of 1789, for example, granted district courts jurisdiction based solely upon the nature of the cause ("all civil causes of admiralty and maritime jurisdiction"), upon both the nature of the cause and the character of the parties ("all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States"), and

[18] Case v. Bowles, 327 U.S. 92, 97 (1946); United States v. California, 297 U.S. 175, 187 (1936); United States v. Washington, 233 F.2d 811, 813 (9th Cir. 1956); Colorado v. United States, 219 F.2d 474, 476-77 (10th Cir. 1954); Minnesota v. United States, 125 F.2d 636, 639 (8th Cir. 1942); California v. United States, 91 F.Supp. 722 (N.D. Cal. 1950). See also City of Newark v. United States, 254 F.2d 93, 96-98 (3d Cir. 1958). The same holding is implicit in United States v. Alabama, 362 U.S. 602, 604 (1960); Alabama v. United States, 304 F.2d 583, 584 n.3 (5th Cir. 1962); Utah v. United States, 304 F.2d 23 (10th Cir. 1962); Utah State Bd. for Vocational Educ. v. United States, 287 F.2d 713 (10th Cir. 1961); United States v. Montana, 134 F.2d 194 (9th Cir. 1943); United States v. Wyoming, 195 F.Supp. 692 (D.Wyo. 1961) aff'd 365 U.S. 569 (1961); Bush v. Orleans Parish School Bd., 188 F.Supp. 916 (E.D. La. 1960); United States v. California, 143 F.Supp. 957 (N.D.Cal. 1956); and United States v. Minnesota, 113 F. Supp. 488 (D.Minn. 1953).

[19] See text related to note 9.

solely upon the character of the parties ("all suits at common law where the United States sue").[20]

The relevant court decisions support the view, evidently entertained by Congress, that congressional power to confer jurisdiction upon lower courts based upon the character of the parties is not limited by the subject matter of the controversy.

The subject matter of *Börs v. Preston*, supra, 111 U.S. 252, was the tortious conversion of personal property, and among the decisions relied upon by the Court was an action against a consul to collect a promissory note.[21] In *Ames v. Kansas*, supra, 111 U.S. 449, the Court relied primarily upon these and other authorities upholding lower court jurisdiction over suits against consuls without regard to subject

[20] Ch. 20, 1 Stat. 77.

[21] Justice Taney's decision on circuit in Gittings v. Crawford, 10 Fed. Cas. 447 (No. 5465) (C.C.D. Md. 1838).

It is argued that these authorities are inapplicable, for a State, unlike a consul or other individual, is clothed with sovereign immunity and may not be sued without consent. Of course it would beg the question simply to assert that sovereign immunity bars district court jurisdiction of suits by the United States against a State unless a particular kind of issue is presented; if the Constitution authorizes Congress to vest jurisdiction in the district courts over suits by the United States against a State without regard to subject matter, consent by the State is implied. See Note 7, and related text. See also City of Newark v. United States, 254 F.2d 93, 96 (3d Cir. 1958). And, as the opinion in Ames v. Kansas, 111 U.S. 449 (1884), demonstrates, in holding that Congress may grant jurisdiction to lower courts over suits within the original jurisdiction of the Supreme Court, the Court perceived no distinction between States on the one hand and "Ambassadors, other public Ministers and Consuls" on the other.

matter, [22] and there is nothing in *Ames v. Kansas,* or in the opinions in cases which have followed it,[23] suggesting that the power of Congress to grant jurisdiction to lower courts over suits against States, unlike suits against consuls, is limited by the nature of the controversy. In context, the unqualified assertion by Chief Justice Waite in *Ames v. Kansas* that it is "within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction" (111 U.S. at 469) cannot be discounted as unintentionally broad.[24]

The fact that there is no subject-matter limitation upon the original jurisdiction of the Supreme Court over suits by the United States against a State argues strongly against a subject-matter limitation upon lower court jurisdiction over such suits. If a subject-matter limitation were applicable only to lower courts,

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[22] In addition to Börs v. Preston (cited in *Ames* at 111 U.S. 469), the Court relied upon Davis v. Packard, 32 U.S. (7 Pet.) 276 (1833), holding that a State court did not have jurisdiction of an action of debt against a consul, jurisdiction exclusive of State courts having been vested by Congress in the federal district courts (111 U.S. at 467-68); Gittings v. Crawford, 10 Fed.Cas. 447 (No. 5465) (C.C.D. Md. 1838), an action in a circuit court against a consul on a promissory note (111 U.S. at 468); St. Luke's Hospital v. Barclay, 21 Fed.Cas. 212 (No. 12241) (C.C.D.N.Y. 1855), an action in a circuit court against consuls to restrain distribution of a fund (111 U.S. at 468); and Graham v. Stucken, 10 Fed.Cas. 945 (No. 5677) (C.C.D.N.Y. 1857), a suit in a circuit court against a consul to set aside a sale of a vessel as void for usuary (111 U.S. at 468).

[23] Excepting only the intimation in the language of Colorado v. United States, 219 F.2d 474, 476-77 (10th Cir. 1954). See note 18.

[24] Particularly in view of the discussion by Chief Justice Waite, immediately following the quoted language, regarding the independence, as bases of federal jurisdiction, of the nature of the controversy and the character of the parties. 111 U.S. at 469-72.

States could be sued in district courts when questions of constitutional power and overriding federal interest were at stake, but could be sued only in the Supreme Court when disputes concerned nonfederal issues, of relatively minor consequence in the federal constitutional scheme.[25]

Aside from the incongruity of this result, it would lead to one or another of two unfortunate consequences. Either the Supreme Court would be compelled to divert time and energy from the resolution of federal constitutional and statutory problems which are properly its primary concern; or it would be compelled to refuse to entertain all but the most significant of the nonfederal-question cases brought by the United States against a State,[26] thus depriving the United States of access to any federal forum in many suits of this kind.

A construction of article III which recognizes power in Congress to vest jurisdiction in lower courts over suits against a State without regard to the nature of the controversy does not deprive the constitutional grant of original jurisdiction to the Supreme Court "of any effective meaning," as the District Court suggested.[27] That jurisdiction remains, to be invoked in those controversies which are of sufficient consequence to justify the attention of the highest tribunal. Congress is left free, however, to vest concurrent jurisdiction in lower courts so that disputes of lesser

[25] Note, 17 Rutgers L.Rev. 620, 626-27 (1962-1963).

[26] Cf. 1 Moore's Federal Practice 258 n.7 (1961); Stern & Gressman, supra note 11, at 306; 11 Stan.L.Rev. 665, 694-700 (1959); Wagner, The Original and Exclusive Jurisdiction of the United States Supreme Court, 2 St.Louis L.Rev. 111, 142 (1952).

[27] 208 F.Supp. at 866.

importance, and those which may be determined more effectively in trial courts, may be litigated there.[28]

II

The question remains whether Congress in enacting 28 U.S.C.A. § 1345[29] exercised its power to vest such jurisdiction in district courts.

An understanding of the problem requires a brief review of the history of Section 1345 and a related provision of the Judicial Code, Section 1251 (b)(2).[30]

Section 1345 had its origin in the provision of Section 11 of the Judiciary Act of 1789 granting federal circuit courts "original cognizance . . . of all suits of a civil nature . . . where . . . the United States are plaintiffs."[31] The subject matter of Section 1251 was first treated in the provision of Section 13 of the Act granting the Supreme Court "exclusive jurisdiction of all controversies . . . where a state is a party."[32] In view of this stipulation in Section 13, suits by the United States against a State were excluded by implication from Section 11's general grant to lower courts of jurisdiction over suits by the United States.

These provisions of Sections 11 and 13 of the Judiciary Act of 1789 remained a part of federal law, essentially unchanged, until the revision of the Ju-

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[28] Cf. United States v. California, 297 U.S. 175, 188 (1936); Börs v. Preston, 111 U.S. 252, 260 (1884), quoting with approval Gittings v. Crawford, 10 Fed.Cas. 447, 451 (No. 5465) (C.C.D. Md. 1838).

[29] See note 1.

[30] 28 U.S.C.A. § 1251 (b)(2) reads:

The Supreme Court shall have original but not exclusive jurisdiction of . . . all controversies between the United States and a State.

[31] Ch. 20, 1 Stat. 78.

[32] Ch. 20, 1 Stat. 80.

dicial Code in 1948.[33] However, various statutes enacted during the intervening years, which conferred jurisdiction on district courts over certain suits brought by the United States, were interpreted as permitting suit in such cases against a State, and as modifying to that extent the section 13 grant to the Supreme Court of exclusive jurisdiction over all suits against States.[34]

In the 1948 Revision of the Judicial Code, the Section 11 grant of district court jurisdiction over suits brought by the United States was re-enacted as Section 1345, with the addition of an introductory phrase, "Except as otherwise provided by Act of Congress." The Section 13 grant of exclusive Supreme Court jurisdiction over suits to which a State was a party was replaced by Section 1251 (b)(2), which provided that the Supreme Court should have "original but not exclusive jurisdiction of . . . controversies between the United States and a State."

By abrogating the prior grant of exclusive jurisdiction to the Supreme Court, Section 1251 (b)(2) removed the bar which had prevented district courts from entertaining suits by the United States against

[33] Section 11 as §§ 563 and 629 of the Revised Statutes (1875), § 24, and ¶ 1 of the Judicial Code of 1911, ch. 231, 36 Stat. 1091 (28 U.S.C. § 41 (1)). Section 13 as § 687 of the Revised Statutes (1875), and § 233 of the Judicial Code of 1911, ch. 231, 36 Stat. 1156 (28 U.S.C. § 341 , 1940)).

[34] See, e.g., Case v. Bowles, 327 U.S. 92, 97 (1946) (§ 205 (c) of the Emergency Price Control Act, ch. 26, 56 Stat. 33 (1943) as amended ch. 325, 58 Stat. 640 (1946)); United States v. California, 297 U.S. 175, 187-88 (1936) (§ 6 of the Safety Appliance Act, 27 Stat. 531 (1893) as amended, ch. 87, 29 Stat. 85 (1896)); United States v. Montana, 134 F.2d 194, 196 (9th Cir. 1943) (§ 203 (a) of the National Recovery Act, ch. 90, 48 Stat. 202 (1933)); Minnesota v. United States, 125 F.2d 636, 639 (8th Cir. 1942) (25 Stat. 357 (1911), 40 U.S.C.A. § 257). See also United States v. Carbon County Land Co., 46 F.2d 980, 987 (10th Cir. 1931).

a State under the jurisdictional grant now embodied in Section 1345. After the adoption of Section 1251 (b)(2), Section 1345 granted jurisdiction over all such suits to district courts, for no other Act of Congress then "otherwise provided."

Our inquiry might end here, for as Professor James Wm. Moore, special consultant to the revisers, has said, the 1948 Revision embodies "a large number of changes, many of considerable importance. The Code should be construed with this in mind and where plain language works a change in the former law this change should be given effect . . . ." Moore's Commentary on the United States Judicial Code 83 (1949).[35]

In any event, the Reviser's Notes also demonstrate "that by enacting section 1251 (b)(2), Congress sought to remove the need for further legislation conferring jurisdiction upon the district courts in cases where the United States brings an action against a state." 38 N.Y.U.L. Rev. 405, 410 (1963).[36]

The revisers were well aware that district courts generally lacked jurisdiction of suits by the United States against a State because of the general statutory grant of exclusive jurisdiction over such cases to the Supreme Court, and that special Acts had been adopted from time to time to overcome this impediment to district court jurisdiction in particular cases. The state of the law was fully discussed in opinions cited in the Reviser's Note to Section 1251.[37] As Professor Moore stated, "while former 28 U.S.C. § 341

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[35] See also Ex Parte Collett, 337 U.S. 55, 61 (1949); Moore's Commentary, p. 78.

[36] See also Wagner, supra note 26, at 117.

[37] United States v. California, 297 U.S. 175, 187-88 (1936); and United States v. 4,450.72 Acres of Land, 27 F.Supp. 167, 176 (D.Minn. 1939), aff'd 125 F.2d 636, 639 (8th Cir. 1942).

(1940)[38] gave the Supreme Court exclusive jurisdiction of an action by the United States against a state, there were other and more recent statutes that qualified this grant so that the United States could sue a state in a district court in certain cases. Section 1251 (b)(2) gives general recognition to this principle by providing that the Court shall have original, but not exclusive jurisdiction of all actions between the United States and a state." Moore's Commentary on the United States Judicial Code 621 (1949).[39] That this was the intended effect of the change finds further support in the Reviser's Note to Section 1345 which states explicitly that the phrase, "Except as otherwise provided by Act of Congress" was inserted in that section "to make clear that jurisdiction [over suits brought by the United States] exists generally in the district courts in the absence of special provisions conferring it elsewhere."

[38] See note 33.

[39] See also Moore's Commentary at 626-27: "Section 1251 (b)(2) states that the Court shall have original, but not exclusive, jurisdiction of 'All controversies between the United States and a State', and gives general recognition to a principle that had developed, prior to the Code, for limited situations. The United States is, however, immune from suit by a state in the absence of consent, and nothing in Article III nor in § 1251 (b)(2) changes that principle. On the other hand, by becoming a member of the Union each state waived its immunity to suit by the United States. The claim of the latter must, of course, be justiciable." (footnotes omitted)

The suggestion in Hart & Wechsler, supra note 12, at 228, that the revisers may have changed the law "without knowing what they were doing," is thus scarcely credible. Even if evidence that the change was deliberate were not available, the notable knowledgeability of the revisers and consultants, and the care with which the work was done (Ex Parte Collett, 337 U.S. 55, 65-71 (1949)) would render the suggestion highly improbable. Chief Justice Stone and Associate Justices Frankfurter and Douglas advised the revisers with respect to matters relating to the jurisdiction of the Supreme Court, which must have included § 1251 (b)(2). 377 U.S. at 66.

Since the 1948 revision the courts have held repeatedly that Section 1345 vests jurisdiction in district courts over suits by the United States against a State.[40] Commentators have uniformly reached the same conclusion.[41] The contrary decision of the court below stands alone.

The principal argument advanced for the exclusion of suits against a State from the reach of Section 1345 (other than the constitutional doubts with which we have already dealt) is that since prior statutory embodiments of the rule stated in Section 1345 were not effective to confer jurisdiction upon district courts over suits against a State, and since the language is essentially unchanged, it should be interpreted as before. But suits against a State were not excluded from the coverage of the pre-1948 counterparts of Section 1345 because the statutory language failed to include them; on the contrary, the language

[40] United States v. Washington, 233 F.2d 811, 813-14 (9th Cir. 1956); Colorado v. United States, 219 F.2d 474, 476-77 (10th Cir. 1954) (relying also on 28 U.S.C.A. § 1355); United States v. Wyoming, 195 F. Supp. 692, 693 (D.Wyo. 1961), aff'd 310 F.2d 566 (10th Cir. 1962); Bush v. Orleans Parish School Bd., 188 F.Supp. 916, 921 (E.D.La. 1960), aff'd 365 U.S. 569 (1961); United States v. Minnesota, 113 F. Supp. 488, 490 (D. Minn. 1953); United States v. Ingram, 99 F.Supp. 465, 468 (E.D. Ark. 1951), rev'd on other grounds, 203 F.2d 91 (8th Cir. 1953).

Jurisdiction was assumed without discussion, despite the absence of any statutory basis other than § 1345 in Utah v. United States, 304 F.2d 23 (10th Cir. 1962); Utah State Bd. for Vocational Educ. v. United States, 287 F.2d 713 (10th Cir. 1961); and United States v. California, 143 F.Supp. 957 (N.D. Cal. 1956).

[41] See, e.g., Wright, supra note 7 at 473 n.23; Moore's Commentary on the U.S. Judicial Code, note 39, supra, and related text, also 612-14; Hart & Wechsler, supra note 12, at 928; 38 N.Y.U.L. Rev. 405, 406 (1963); 111 U.Pa. L.Rev. 1011, 1012-13 (1963); 17 Rutgers L.Rev. 620, 624 (1963); Wagner, supra note 26, at 117.

was and is amply broad. Suits against a State were excluded solely because the predecessors of Section 1251 (b)(2) had vested exclusive jurisdiction over such suits in the Supreme Court. Removal of this bar by Section 1251 (b)(2) eliminated the basis for the exception which had been implied in the clear language of the predecessors to Section 1345. This change, as we have seen, was a product of deliberate choice. It should be given effect.[42]

It is also argued that surrender of sovereign immunity is not to be lightly implied, and, since Section 1345 does not specifically mention States as parties defendant, an intent to permit suit against them in district courts should not be implied, at least where the claim is merely for damages in tort.

The doctrine of sovereign immunity from suit in tort is scarcely a favored one.[43] And statutes vesting jurisdiction in district courts over suits by the United States have been held to apply to suits against States although States were not specifically mentioned as possible defendants.[44] The presumption that the sovereign is not bound unless named "is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does

[42] The revision did not purport merely to restate prior law: "The Judicial Code of 1948 represents both an evaluation of Title 28 . . . and an enactment into positive law of the evaluation." Moore's Commentary on the U.S. Judicial Code 30. See note 35, supra, and related text.

[43] See e.g., 2 Harper & James Law of Torts 1612 (1956).

[44] See, e.g., Case v. Bowles, 327 U.S. 92, 98-99; United States v. California, 297 U.S. 175, 186; United States v. Montana, and Minnesota v. United States, cited in note 40 supra. In United States v. Alabama, 267 F.2d 808 (5th Cir. 1959), the presumption urged by appellee was applied in construing § 1971 (c) of the Civil Rights Act of 1957, P.L. 85-315, 71 Stat. 637. The resulting interpretation was, in effect, reversed by the Congress. United States v. Alabama, 362 U.S. 602, 604 (1960).

not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated." *United States v. California,* 297 U.S. 175, 186 (1936).

As we have seen, States may be sued by the United States in the Supreme Court without their consent, and it is difficult to understand how they would benefit if jurisdiction were confined to that Court. The Supreme Court is primarily an appellate tribunal, ill-suited to trial of factual issues commonly crucial in such cases as the present one. Litigation of such issues in the Supreme Court would be inconvenient and costly to both parties, and particularly to the State. Jurisdictional grants to district courts over suits by the United States against States on particular claims have become so commonplace [45] as to sap the substance from the notion that the dignity of the State will suffer damage from a grant of jurisdiction to district courts over suits on all federal claims.[46]

Suits by the United States against States, until recently rare,[47] are now not uncommon, and must inevitably increase with the broader activities of both the national government and the governments of the States. Common sense dictates that those suits which involve routine, largely factual disputes be litigated in the district courts,[48] and that the jurisdiction of the Supreme Court be invoked initially only in those rare cases which present large issued.

Reversed.

[45] See note 34.

[46] 111 U.Pa. L. Rev. 1011, 1013 (1963).

[47] Annotated Constitution of the United States, S.Doc. No. 170, 82d Cong., 2d Sess. 585 (1953).

[48] Cf. United States v. California, 297 U.S. 175, 188-89 (1936); Minnesota v. United States, 125 F.2d 636, 639 (8th Cir. 1942).

APPENDIX C

Article III of the Constitution of the United States:

"Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make."

28 U. S. C. Sec. 1251:

"(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more States;

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All action or proceedings by a State against the citizens of another State or against aliens."

28 U. S. C. Sec. 1345:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

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